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Nos. 95-259 and 95-779

In the Supreme Court of the United States

OCTOBER TERM, 1995

DARLENE WALTERS AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioners,

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC., AND LEONARD BIEBER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was founded in 1963 by leaders of the American bar, at the request of President Kennedy, to involve private attorneys throughout the country in the national effort to assure to all Americans the protections of the civil rights laws. Through the Lawyers'

Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C., hundreds of lawyers from many of the nation's leading law firms have joined to represent many thousands of victims of discrimination across the country in cases brought under Title VII of the Civil Rights Act of 1964 and under the other civil rights laws. The Lawyers' Committee has a longstanding interest in the coverage and effective and efficient enforcement of Title VII and other civil rights laws.[1]

SUMMARY OF ARGUMENT

The only employers covered by Title VII are those who "ha[ve]" at least fifteen employees for a limited part of the year. How best to apply that fifteen-employee minimum cannot be determined solely by reference to the words of the statute. This Court will be forced to choose between a coverage test that relies heavily upon the existence of a regular and continuing employer-employee relationship and a test that emphasizes either payment or physical presence on the job. The former test is easy to understand and apply and deals effectively with the many variations of employment arrangements that are common to relatively small businesses. The latter requires time-consuming and expensive record-keeping and analysis, and still produces bizarre results. The Court should adopt the "payroll method" formulated by the EEOC and approved by two courts of appeals, and reverse the decision below.

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[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

ARGUMENT

I. TITLE VII'S COVERAGE PROVISION HAS NO PLAIN MEANING.

Title VII's coverage provision, which defines covered employers as those who "ha[ve]" fifteen or more employees "for each working day" during a limited part of the year, is poorly drafted, and has no one "plain meaning."[2] Because of the inherent ambiguity of the coverage provision, at least two plausible interpretations of what it means to "have" fifteen or more employees "for each working day" have emerged from the courts of appeals -- plausible, at least, if the provision is read with blinders, without reference to the context or the purpose of the statute. The rule adopted by the Seventh and Eighth Circuits distinguishes salaried workers from hourly or part-time workers, counting all salaried workers but counting hourly workers only when they are at work or on paid leave. The Seventh Circuit stated in the case below that "the most natural interpretation of [the phrase "for each working day"] looks to the number of employees physically at work on each day of the

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[2] Title VII defines a covered "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." § 701(b), 42 U.S.C. § 2000e(b). The "employees" referred to are defined as those "employed by an employer," § 701(f), 42 U.S.C. § 2000e(f); this is a standard definition derived from the common law and also used in other federal employment statutes. 29 U.S.C. § 1002(6) (ERISA); 29 U.S.C. § 203(e)(1) (FLSA); Rev. Rul. 87-41, 1987-1 C.B.296, 298-99 (various tax laws); *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318 (1992).

week."[3] Yet the court did not consider itself bound by the "natural" interpretation, since it also counted employees who were on paid leave. Rather, its decision implies a "daily payment" principle of counting hourly employees, under which the counted employees are defined by the fact of compensation. Under a daily payment principle, an employee is an "employee for each working day" only on days when she is at work or otherwise being paid. Although such a principle suggests that salaried employees should not be counted when they are on unpaid leave, the court below stated explicitly that its method "counts all salaried employees toward the minimum," presumably even on days when they are on unpaid leave.[4] Because the distinctions among employees created by the Seventh Circuit on the basis of compensation cannot be derived from the words of the statute, any assertion that the Seventh Circuit was applying a plain meaning rule is clearly incorrect.

The First and Fifth Circuits, on the other hand, have simply concluded that an employee is counted "for each working day" when he or she is on an employer's payroll for each working day in a given week.[5] This "payroll method" is based on the existence of an employment relationship and gives effect to the

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[3] *EEOC* v. *Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1228 (7th Cir. 1995); *Zimmerman* v. *North American Signal Co*, 704 F.2d 347 (7th Cir. 1983); *EEOC* v. *Garden & Associates, Ltd.*, 956 F.2d 842 (8th Cir. 1992) (adopting *Zimmerman* without further analysis).

[4] *Metropolitan*, 60 F.3d at 1227.

[5] *Thurber* v. *Jack Reilley's, Inc.*, 717 F.2d 633 (1st Cir. 1983); *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67 (1st Cir. 1995); *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980).

coverage provision's term "calendar weeks." A "calendar week," by itself, must mean seven days; the addition of "for each working day" may have been intended to ensure that enterprises that operate fewer than all of the days of the week will be covered if they have more than fifteen employees on the days that they operate. We cannot pretend that there is a wholly satisfactory explanation of why these words were chosen, but we submit that the use of the somewhat unusual *"calendar weeks"* supports determining coverage on the basis of weekly employment rather than by a separate examination of each day in each week.

Both the "daily compensation" and "payroll" methods give meaning to all of the words in the coverage provision, although with different emphasis. The daily compensation method focuses narrowly on "for each working day." The payroll method emphasizes what it means to "have an employee" and the reference to twenty "calendar weeks." The provision itself does not dictate which of those interpretations is correct. We suggest that the choice should be made by reference to Congress's objective that Title VII cover all employers except those whose small size would make enforcement unduly burdensome and time-consuming.

II. THE SEVENTH CIRCUIT'S METHOD OF COUNTING EMPLOYEES IS ARBITRARY AND UNWORKABLE.

When a statute has no plain meaning, its interpretation must be guided by the objectives of the statute, its legislative history, deference to the enforcing agency, and the practicalities of application. Despite the Seventh Circuit's acknowledgment

that "the statute could have been worded more clearly," the court claimed that the coverage provision had a "plain" meaning.[6] But the court created distinctions among salaried, hourly, and part-time workers that were not plain; they were not, in fact, supported by the statute, much less derived from any of the recognized guides to statutory interpretation. The Seventh Circuit's opinion imports these distinctions into a statutory text and context that in no way suggest them. As a result, litigation will certainly ensue over whether flextime workers and certain part-time workers are counted. Disputes are also certain to arise over the coverage of businesses that pay employees by sales commissions, a form of payment that accommodates and results in irregular working arrangements.

The Seventh Circuit's focus on the phrase "for each working day" not only fails to resolve substantial uncertainties about what constitutes a "working day", but, taken to its logical conclusion, undermines the application of the statute. When rigorously applied to employers who hold themselves out as "open seven days a week," the method forces courts to invent new concepts of "working day" to avoid absurd results. For instance, in *Wright* v. *Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327 (N.D. Ind. 1992), the defendant operated a clinic which was open Monday through Friday and half days on Saturday. Although the clinic was open each Saturday, providing the same services to its patients as it provided on weekdays, it was thinly staffed on that day, and would not have been covered by Title VII if Saturday counted as a "working day." The court reached the strained but sensible conclusion

[6] *Metropolitan*, 60 F.3d at 1228.

that Saturday was not a "working day," because the clinic did not conduct "normal, full operations" on that day, *id.* at 1333.

Wright shows that treating "working day" as the most important term in the coverage provision creates a dilemma. As the court observed, "a 200-employee factory, running three shifts from Monday through Saturday, could be placed beyond the reach of Title VII by sending a lone telephone operator to work on Sunday." *Id.* The same result would follow if a large business could not be conducted unless ten persons were at work every Sunday. Clearly, the coverage provision was not meant to exclude such businesses. But if the only way to avoid this result is to introduce the fact-specific concept of "normal, full operations" to give "working day" a meaning different from what that term is ordinarily thought to mean, it cannot be said that the provision is being given its plain meaning.

The Seventh Circuit's method, whether interpreted as requiring a "daily compensation" analysis or creating strict distinctions between salaried and hourly workers, imposes a crushing practical burden on employers and employees seeking to determine their coverage. Most small employers do not require employees to punch a time clock, nor do they prepare and retain two years' worth of daily attendance records. Yet the Seventh Circuit's focus on "for each working day" requires that they produce and maintain such records in order to know whether they are covered, and that they check these records routinely, since their coverage may vary while their payroll remains the same. Employers who fail to keep such painstaking records cannot know whether they are covered. In this way, the emphasis on "working day" ignores the value to small

businesses and their employees of certainty in application of the law.

Potential plaintiffs suffer even more than small businesses under the Seventh Circuit's method. An employer who fails to keep the pertinent records can deprive a plaintiff of the evidence needed to establish coverage. For instance, a restaurant may employ twenty-five people from Thursday through Sunday but have a staff close to fifteen on slower nights. If the restaurant owner does not keep meticulous records of which employees were present, salaried, or on paid leave on each day of the relevant two-year period, a plaintiff will not be able to prove that the restaurant is covered by Title VII even if the restaurant has the requisite number of employees. By giving a certain class of defendants the power to dictate whether a plaintiff can prove the jurisdictional minimum, the Seventh Circuit forecloses a class of suits in an arbitrary way that Congress could not have intended in drafting the jurisdictional provision.

Finally, the Seventh Circuit's method tends to exclude establishments employing those whom Title VII was meant to protect. A small business that hires mostly part-time workers is more likely to be excluded from coverage by this method. Part-time work, especially by minorities and women, has been routine since the passage of the Civil Rights Act of 1964. Bureau of Labor Statistics data from 1968-1987 show that the population of part-time workers has consistently contained

more women and minorities than the general population.[7] By disproportionately excluding businesses that hire many such workers, the Seventh Circuit method adversely affects the very class of people for whom Title VII was enacted.[8]

III. THE "PAYROLL METHOD" OF COUNTING EMPLOYEES IS A LEGITIMATE AND PRACTICAL INTERPRETATION OF THE COVERAGE PROVISION.

As the Seventh Circuit itself concedes, ambiguities in a remedial statute such as Title VII must be resolved in the plaintiff's favor.[9] The payroll method endorsed by the EEOC

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[7] U.S. Dept. of Commerce, Bureau of Labor Statistics, *Labor Force Statistics Derived From the Current Population Survey, 1948-87*, Tab. B-18, pp. 708-09 (Aug. 1988).

[8] Today, more than one in four people in the workforce work for a company with 20 or fewer employees. This percentage has remained constant between the years 1980 and 1992. U.S. Dept. of Commerce, Bureau of the Census, *County Business Patterns*, 1993, Fig. 1; U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1995*, No. 857 at 550. Forty-five percent of women who work outside the home are employed by businesses of 100 or fewer employees. Testimony of 9 to 5, The National Assn. of Working Women, et al., submitted to the Commission on the Future of Worker-Management Relations, Apr. 6, 1994 (Judith L. Lichtman, presenter), Fig. 6-4.

[9] *Zimmerman*, 704 F.2d at 353. *Cf. Irwin* v. *Department of Veterans Affairs*, 489 U.S. 89, 102 (1990) (Stevens, J., concurring in part and dissenting in part) ("Title VII, a remedial statute, should be construed in favor of those whom the legislation was designed to protect."). The holding as to which Justice Stevens dissented was superseded by the Civil Rights Act

(continued...)

and two courts of appeals is consistent with the text, resolves ambiguities appropriately, and is the only method that adequately considers the traditionally recognized guides to interpretation. The payroll method should be adopted by this Court as the most logical interpretation of Title VII's coverage provision.

The payroll method is based on the common-sense concept that, since an employer must "ha[ve]" fifteen employees, "the relevant employees [are]... all those who had an *ongoing employment relationship* with the employer during the requisite twenty weeks."[10] This method interprets "ha[ving] an employee for each working day" as having a contract of employment, whether written or oral, with the employee for each day during twenty weeks of the two years counted. The method relies on the best existing evidence of the existence of a contractual employment relationship: an employee's presence on the payroll. The method's results are logical: as one district court put it, an employee who was not physically present on a given day, but who had worked the day before and was expected to show up for work the following day, should be counted as an

[9] (...continued)
of 1991, which extended the time limit for filing a complaint to ninety days. Civil Rights Act of 1991, § 114(1) (codified as amended at 42 U.S.C. § 2000e-16). *See also Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972).

[10] *Vera-Lozano*, 50 F.3d at 69 (emphasis added).

employee on the given day.[11] And, because the method requires only an examination of payroll records, which must already be maintained for tax purposes, it is straightforward in application, imposes no additional burdens on employers, and requires no further definition of terms in the coverage provision.

As pointed out above, the payroll method views the "calendar week" requirement as an important part of the coverage provision and gives it greater effect than does the daily computation method. The superiority of the payroll method, however, lies in its practicality; it enables employers and employees to know easily and reliably whether the Act applies, and it eliminates the costly and wasteful discovery process for the thousands of employers that are close to the line. This is fully in accord with the congressional intention. In the course of the debate on the bill, Senator Cotton proposed an amendment that would have eliminated the coverage of Title VII for employers with less than 100 employees. In opposing the amendment, which was defeated, Senator Humphrey, the floor manager of the bill, noted that "[w]e have simplified the recordkeeping to the point where State records suffice, with whatever notations may be necessary to indicate employment." A few minutes later he added, "... what is more important than the coverage of the people is the manner in which those of us who worked upon the substitute package have sought to simplify the administration of the bill, the recordkeeping, the rights of employers, the rights of employees, the inclusion of

[11] *Wright* v. *Kosciusko Medical Clinic, Inc.*, 791 F. Supp. 1327, 1332 (N.D. Ill. 1992). Whether the employee was paid for the day on which he was physically absent from work was not a factor in the court's analysis.

State and local authority, and the time factor involved ...." 110 Cong. Rec. 13,088 (June 9, 1964).[12]

All of these reasons support the conclusion that the payroll method was more than reasonably adopted by the EEOC. "[T]he EEOC's interpretation of ambiguous language [in a statute it is charged with enforcing] need only be reasonable to be entitled to deference." *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988); *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *cf.*, *NLRB* v. *Town & Country Electric, Inc.*, 116 S. Ct. 450 (1995) (agency interpretation of "employee" entitled to deference). Therefore its method should be adopted by this Court.

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[12] Senator Humphrey was undoubtedly referring to §§ 709(c) and (d), 42 U.S.C. §§ 2000e-8(c) and (d). Section 709(c) authorizes the EEOC to adopt regulations requiring employers to maintain such records as are reasonably necessary to carry out the purposes of the Act. Section 709(d) requires prior consultation with interested state and federal agencies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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